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20 May 2006  
by Federal Express

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Office of Proceedings

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

MAY 22 2006

Part of  
Public Record

Re: PYCO Industries, Inc. - Feeder Line Application  
-- South Plains Switching, F.D. 34844

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc. ("PYCO"), enclosed for filing please find an original and ten copies of PYCO's Reply to SAW's Proposed Procedural Schedule.

Because this Reply relates to actions which are likely under immediate consideration by the Board, PYCO requests expeditious circulation of the enclosed Reply.

By my signature below, I certify service by express (next business day) delivery upon Thomas McFarland, counsel for SAW, on the date above at his address of record.

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange  
counsel for PYCO Industries

Encls. (orig. and 10)

cc. Thomas McFarland, Esq. (w/encl.) (for SAW)  
Gary McLaren, Esq. (w/encl.) (for PYCO)



BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
FEEDER LINE DEVELOPMENT -- ) F.D. 34844  
SOUTH PLAINS SWITCHING LTD. )

ENTERED  
Office of Proceedings

Applicant PYCO's Reply  
to SAW's Proposed Procedural Schedule

MAY 12 2006

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Feeder line applicant (and shipper) PYCO Industries, Inc. (PYCO), replies as follows to the procedural schedule proposed by incumbent rail carrier South Plains Switching Ltd. (SAW) in its letter (email) to this Board dated and filed May 18, 2006.

As stated in SAW's letter, PYCO's Feeder Line Application (FLA) includes discovery requests to SAW. As PYCO explained in its FLA, PYCO regards its FLA as complete, but PYCO throughout made assumptions favorable to SAW for lack of access to information held only by SAW. As a result, the NLV and GCV figures calculated by PYCO's experts are higher than what one would expect the actual data would support. In fairness to itself, PYCO sought discovery, and noted it wished an opportunity to supplement. FLA at 7-8.

Although SAW does not mention the fact, PYCO provides in its discovery requests that SAW must respond within fifteen business days of acceptance, or conditional acceptance, of its FLA by this Board. See FLA Exhibit P.

I. SAW's Proposals and PYCO's Objections

SAW's proposal. In its letter, SAW proposes the following discovery schedule: "30 days for SAW to respond to the [PYCO]

discovery; 30 days for SAW to submit its own discovery; and 30 days for resolution of discovery disputes." SAW then suggests that its sixty day period for comment begin to run. With respect, SAW's proposal makes no sense.

PYCO's objections to SAW's proposed schedule. SAW has had PYCO's requested discovery since May 5, 2006. Under 49 C.F.R. § 1151.2(b), this Board has until June 5, 2006,<sup>1</sup> to determine whether to accept, conditionally accept, or to reject the FLA. Should the Board accept or conditionally accept the FLA, SAW shall have had that interval as well as the fifteen business days PYCO has provided SAW for a response. As of the date this pleading was prepared (May 19), SAW already is guaranteed more than the thirty days it requests in its letter. It does not need any more time.

Moreover, responding to PYCO's discovery should not be burdensome. PYCO has asked for typical due diligence information of interest to any prospective purchaser and that information certainly germane to a FLA. SAW has represented to this Board that it is actively seeking buyers (or competing feeder line applicants) for the property in question. See SAW "Petition" filed 15 May 2006 in this docket.<sup>2</sup> If SAW's

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<sup>1</sup> Where a deadline falls on a weekend or holiday, PYCO uses the next business day, and calculates subsequent deadlines from that date.

<sup>2</sup> In SAW's "petition" filed May 15 (to which PYCO filed an opposition), SAW seeks to moot this FLA proceeding in favor of negotiations with US Rail Partners, whom it represents became interested in acquiring SAW's properties at the instigation of SAW's counsel.

representation is more than a ruse or some kind of gambit, then one can reasonably assume that SAW is making available to these parties exactly the kind of due diligence information PYCO is seeking from SAW in discovery. Thus, the discovery sought by PYCO is no additional burden to SAW because SAW is already supplying it to others. In the circumstances, SAW has no excuse for any delay in response.

In short, if SAW has already turned over information on shippers to a prospective purchaser like it claims in respect to US Rail Partners, then that information should be provided to PYCO, now. If SAW allowed US Rail Partners to inspect the premises, as SAW claims, then it should allow PYCO that opportunity, now. What SAW instead is doing is manipulating the FLA process so as to deprive PYCO of its congressionally intended feeder line remedy.

SAW says after it responds to PYCO, it needs 30 days to file discovery against PYCO. This is absurd. SAW could propound discovery now. But the real question is why SAW needs any discovery at all. The legal issue in a FLA proceeding under 49 U.S.C. § 10907 is the Going Concern Value (GCV) and the Net Liquidation Value (NLV) of SAW's assets. SAW has relevant information on this score, not PYCO. Any information PYCO has compiled (from outside sources) is in its FLA.

If one looks at the feeder line statute, the only information the applicant must provide about itself is (a) information showing financial responsibility and (b) an

operating plan. PYCO has already provided this information in its FLA. SAW does not require additional time, let alone weeks of time, to propound additional discovery on these matters, and PYCO believes it has already answered these questions anyway. In short, if SAW is permitted any discovery against PYCO, that discovery should be served on PYCO within five (5) business days of acceptance or conditional acceptance of the FLA.

If SAW serves discovery requests on PYCO, then PYCO requests fifteen (15) business days to respond. When one takes into account the fact that SAW has had PYCO's discovery since May 5, the fifteen business days PYCO would provide for itself is far less than what SAW is enjoying. PYCO does wish a protective order in place before disclosing confidential financial information.

SAW wants thirty days for "discovery disputes." Based on PYCO's experience thus far with SAW, we do not underestimate SAW's propensity to dispute. However, since our discovery relates to standard due diligence matters and is otherwise responsive to the showings required under 49 U.S.C. § 10907, the main dispute presumably relates to business confidentiality of much of the information sought. That dispute traditionally is avoided in STB proceedings by entry of the standard STB protective order. As already noted, PYCO anticipated this, and annexed the standard STB order as Exhibit R to our FLA. Our FLA requests that the protective order be entered. SAW has not objected to the terms of that order. The order should be issued

at the time Board accepts or conditionally accepts PYCO's FLA.

As to remaining discovery disputes, PYCO believes that the parties should attempt voluntary resolution of discovery disputes by telephone within three (3) business days of receipt of objections, and make any motions to compel within five (5) business days of receipt of objections. Replies to motions to compel should be made within three (3) business days of receipt of the motion. We hope that these may be expeditiously resolved by the Board.

Minimum time for PYCO to supplement. Under this Board's feeder line regulations, PYCO has an opportunity to reply to SAW twenty (20) days after SAW files its comments on PYCO's FLA. 49 C.F.R. § 1151.2(f). This seems to us the chief avenue for supplementation of our FLA with information received during discovery. However, out of an abundance of fairness, PYCO is prepared to supplement its FLA based on SAW's discovery response (to the extent SAW makes such a response in accordance with our proposed schedule) within twenty (20) business days from the due date of SAW response. If SAW drags its feet, or otherwise games its response, then our final supplementation would be at the time of our Reply pursuant to § 1151.2(f). This is the best that can be accomplished if SAW is uncooperative, and it seems anticipated by the FLA regulations.

In order to facilitate rapid response, PYCO further requests that all discovery requests and objections, motions to compel and relies thereto, and similar pleadings or materials be

communicated by fax transmission with express (next day delivery) confirmation copies between counsel for PYCO and counsel for SAW.

PYCO's proposed discovery schedule. To summarize key points from the above, PYCO proposes the following discovery schedule if this Board accepts, or conditionally accepts, the PYCO FLA. The days stated are business days (exclusive of weekends and holidays).

x = date of acceptance

x + 5 = SAW objections to PYCO discovery served and  
SAW discovery to PYCO served

x + 10 = PYCO objections to SAW discovery served

x + 15 = SAW response to PYCO discovery

x + 20 = PYCO response to SAW discovery

x + 35 = PYCO supplementation to the extent of SAW's response

Ramifications if Board only conditionally accepts PYCO FLA.

If the Board only conditionally accepts the PYCO FLA on or before June 5, then PYCO would expect the Board to rule on acceptance after receiving PYCO's supplementation so that the sixty day comment period (49 C.F.R. § 1151.3(e)) and related schedules would commence.

By PYCO's calculation, the maximum period of time that PYCO by statute may receive alternative rail service under the orders issued in Finance Docket 34802 is 270 days. This period lapses on or about October 23, 2006.

In the event the Board only conditionally accepts the PYCO FLA subject to supplementation, then it is essentially

impossible for this FLA proceeding to be completed prior to October 23, 2006. In order to protect itself from inadequate rail service from, and additional retaliation by, SAW, PYCO will then be required to file another proceeding, presumably under 49 C.F.R. Part 1147, for longer term relief.<sup>3</sup>

Ramifications if the Board accepts the PYCO FLA on or before June 5. If the Board accepts the PYCO FLA (as we profoundly hope) on or before the 49 C.F.R. § 1151.2(b) deadline (June 5), then the same schedule outlined above for discovery should apply. The sixty day comment period (§ 1151.3(e)) and related schedules would commence on the date of acceptance.

If the Board accepts PYCO's FLA on or before June 5, it is possible to complete this FLA proceeding such that a new rail carrier may permanently be in place in Lubbock by October 23, 2006. This would certainly comport with 49 U.S.C. § 10101(15), among other things.

In order to place a new carrier in Lubbock pursuant to the FLA proceeding before October 23, 2006, PYCO believes that this Board must be in a position to issue its decision on terms and conditions no later than approximately Monday, September 25, 2006. The feeder line regulations provide that PYCO and competing applicants have ten days to file an acceptance of terms and conditions established by the Board. 49 C.F.R. § 1151.2(h). Assuming an STB decision on Monday, September 25,

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<sup>3</sup> PYCO is awaiting some indication from the Board concerning the schedule for the FLA proceeding before determining whether to file a Part 1147 proceeding.

2006, this ten day period would expire on Thursday, October 5, 2006. The regulation provides that if there are competing applicants, the incumbent carrier has fifteen (15) days from the Board's decision setting terms and conditions to select the party to whom it will sell the line. Id. § 1151.2(i). Under the assumptions above, that time would expire on October 10, 2006.

PYCO requests that this Board require any party which accepts the terms set by the Board commit to be mobilized to provide service to PYCO on the SAW lines no later than October 23, 2006. This date is the last day on which alternative rail service to PYCO is statutorily permitted. Under the time line above, the new carrier would have thirteen calendar days to finalize arrangements with SAW and BNSF, inspect the track, move in crews and equipment (to the extent necessary), and commence operations in Lubbock.

If there are no competing applicants, some of this pressure would be removed because SAW would not have the opportunity afforded by § 1151.2(i) to play competing applicants against each other and against PYCO, to attempt to cut deals other than those set by the Board, and then to select with whom it wishes to deal. We note, however, our concern that any switching operation on SAW's lines in Lubbock must be well-qualified, for an incompetent performer not only can wreck havoc with PYCO and other shippers on SAW, but also can congest BNSF's Lubbock operations.

As PYCO noted in its FLA, PYCO and other "SAW shippers" are really BNSF customers, not SAW customers. SAW service in Lubbock is pursuant to a contract between SAW and BNSF. Pursuant to section 7 of the BNSF/SAW contract, BNSF inter alia has the power of first refusal to reacquire the SAW assets in the event of a sale. Any party acquiring the assets must also commit to discharge the obligations and duties of SAW under its contract with BNSF.

Given the contract obligations of SAW to BNSF, it would appear to PYCO that BNSF, not SAW, should make any selection as to the party with whom SAW deals in the event of competing applications. Because there may not be competing applications, or if there are, they may not accept this Board's decision on terms and conditions, this issue is premature and not ripe for resolution at this time. PYCO reserves the right to raise this and other issues relating to 49 C.F.R. § 1151.2(i) should competing applications be filed, or, if filed, should competing applicants purport to accept this Board's terms and conditions decision.

Resultant proposed overall schedule. These considerations lead to the following overall proposed schedule:

PYCO FLA accepted: due on June 5, 2006

Competing FLA's (if any): due on July 5, 2006.

SAW and any other comments: due on August 4, 2006

PYCO Reply: due on August 24, 2006

STB decision on terms and conditions: requested by

September 25, 2006.

Acceptance of terms: ten days after STB decision [Monday, October 5, 2006]

Selection of purchaser (to the extent this action item ends up germane): fifteen days after STB decision [Tuesday, October 10, 2006]

New carrier commences operations: no later than October 23, 2006.

Under PYCO's proposed discovery schedule, SAW would have PYCO's discovery responses in ample time for preparation of its comments. To the extent SAW cooperates in making timely and complete discovery responses, SAW would also have PYCO's supplementation approximately ten days in advance of its comment due date. The Board would have slightly over thirty days to render a decision, and a new carrier could be in place in Lubbock before expiration of the statutory alternative rail service period.

If the Board only conditionally accepts PYCO's application, there would not appear to be time to complete proceedings before the statutory alternative rail service period lapses. In that event, PYCO as already noted must consider additional proceedings to ensure that it is not subject to inadequate service from, and further retaliation by, SAW.

SAW due process claims. In its letter dated May 18, SAW states that "PYCO has requested an accelerated procedural schedule, but that would be inconsistent with the statutory

requirement ... that the Board determine whether public convenience and necessity requires or permits as sale of the rail line only 'after a hearing on the record.'" This statement is obviously incorrect. The procedural schedule which PYCO outlines above does not shorten any procedural deadline specified in 49 C.F.R. Part 1151.<sup>4</sup> The schedule which PYCO outlines herein is accelerated only in the sense that it is far faster than other recent FLA proceedings. PYCO is faced with a situation which does not afford the leisure of time.

As to discovery, this Board's rules currently provide that a party may prescribe a due date for its discovery as short as fifteen (15) calendar days. See 49 C.F.R. § 1114.26(a) (interrogatories); § 1114.27(a) (admissions). The discovery regulation does not specify a minimum period of notice for entries on to land and document requests. PYCO is more generous with SAW than the regulations require, giving SAW fifteen (15) business days, plus the entire interval between the filing of its FLA on May 5 and acceptance or conditional acceptance by this Board.

The procedural schedule outlined above is also more generous at all points, including time for reply and time for this Board to reach a decision, than the times prescribed by

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<sup>4</sup> The applicable statute (49 U.S.C. § 10907) does not specify any particular procedures. It does not provide for a right of reply by the incumbent railroad, or for competing applications. All required procedures are set forth in the regulations. Within reasonable limits, the Board may adjust those procedures to fit the circumstances of a particular case.

statute and regulation for "offers of financial assistance" ("OFA's") pursuant to 49 U.S.C. § 10904. OFA's are virtually identical to feeder line applications. Both OFA and FLA statutes provide for mandatory transfer of property from one party to another on terms and conditions set by the Board for continued rail use. Under the OFA statute, an OFA applicant may request terms and conditions be set by this Board thirty days after making an offer.<sup>5</sup> Under the applicable OFA regulations, the applicant must submit its evidence at that time. 49 C.F.R. § 1152.27(h)(4). The applicable regulation gives the incumbent railroad only five (5) additional days to file all its evidence (i.e., to reply). Id. All late filed evidence is rejected. The Board is required by statute to issue a decision setting the terms and conditions of sale (including price) thirty days after initial request (25 days after receiving the incumbent railroad's reply). 49 U.S.C. § 10904(f)(1). The adequacy of OFA procedures was upheld by Judge Posner in Chicago & N.W. Transp. Co. v. United States, 678 F.2d 665, 671 (7th Cir. 1982).

Under PYCO's proposed schedule, SAW has sixty days from date of acceptance to take whatever position it wishes. This Board has thirty days from receipt of PYCO's final reply to act. Since PYCO's proposed schedule at all points is more generous to

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<sup>5</sup> In general, an OFA applicant is not required to make an offer until the incumbent railroad has provided a considerable body of information on its facility. See 49 C.F.R. § 1152.27(c)(1)(i)(C) & (c)(2)(i)(C) (tolls time to make offer until railroad furnishes valuation information). PYCO in preparing its feeder line application had no such advantage.

the parties (and to the Board) than the OFA statute, and since OFA procedures have withstood due process challenge, adherence to the time lines of 49 C.F.R. Part 1151 is considerably more than is required to afford SAW all the process which is its due. SAW's suggestion that PYCO's requested for expedition denies SAW's procedural rights falls very flat given the result in the Chicago & N.W. Transp. Co. case, supra.

Finally, we note that 49 C.F.R. § 1151.2(k) authorizes the Board to grant extensions of filing dates. Illness, accident, or belligerent discovery responses may require extensions, but due regard should be had for the need to get the case into the Board's hands by the end of August.

Alternatives. PYCO would be pleased if this Board could fashion a more expeditious schedule. However, as noted by PYCO in its FLA at 7-8, PYCO's NLV and GCV calculations for the SAW properties are upper bound numbers. We believe that had we access to SAW information by discovery and a right of entry, we could demonstrate a substantially lower value. We estimate that our experts require twenty (20) business days to incorporate information disclosed by SAW in discovery, or data retrieved upon entry, into their reports.

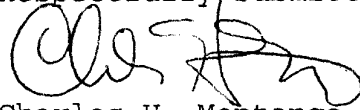
PYCO would support omission of the provision for competing feeder line applications in order to save time. We believe that the interests of shippers in Lubbock can be adequately protected by BNSF through its use of its right of first refusal under section 7 of the BNSF/SAW contract. That provision would

appear to operate to supercede or to modify SAW's "right" to select among competing applicants in any event.

Conclusion

Feeder line applicant PYCO seeks a procedural schedule which allows a transfer of this line to take place such that the new rail carrier can serve shippers in south Lubbock, including PYCO, by October 23, 2006. We oppose SAW's transparent attempts to prevent that from happening through manipulation of discovery deadlines. PYCO's proposed discovery schedule (as well as PYCO's proposed schedule for the proceeding generally) at all points comports with the deadlines in 49 C.F.R. Part 1151, and is considerably more generous in time than the comparable provisions for OFA's under 49 U.S.C. § 10904. PYCO requests that the Board adopt a schedule as suggested by PYCO, and not along the lines suggested by SAW.

Respectfully submitted,



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